Pratt Towers, Inc. *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Cases 29–CA–23012 and 29–CA–23137

May 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

This case is the third in a recent series of cases involving Pratt Towers, Inc. (Pratt Towers or the Respondent) and Local 32B–32J, Service Employees International Union, AFL–CIO (the Union or the Charging Party).[1] In this case, we consider the Respondent's exceptions to the judge's findings that the Respondent (1) violated Section 8(a)(5) by withdrawing recognition from the Union; and (2) violated Section 8(a)(1) by coercively interrogating employees.[2]

For the reasons set forth below, we agree with the judge that the Respondent unlawfully withdrew recognition from the Union and unlawfully interrogated employees about their support for the Union.

I. FACTUAL BACKGROUND: THE PRIOR BOARD DECISIONS

The Respondent operates a cooperative apartment building in Brooklyn, New York. The bargaining relationship between the Respondent and the Union began in April 1998, when the Union prevailed over a prior incumbent union in a representation election, and was certified to represent a small unit of then eight, now six, long-tenured building service employees. The parties negotiated unsuccessfully for a collective-bargaining agreement in the autumn and winter of 1998. The employees went out on strike in support of their bargaining demands in February 1999.[3] Each of the striking employees subsequently made an unconditional offer to return to work in March, but the Respondent denied each reinstatement unless they individually denounced their affiliation with the Union. The events surrounding the Union's strike and its aftermath were the subject of two prior Board cases.

A. Pratt Towers I

In *Service Employees Local 32B–32J (Pratt Towers)*, 337 NLRB 317 (2001) (*Pratt Towers I)*, the General Counsel alleged that the Union violated Section 8(b)(4)(ii)(A) by striking to compel the Respondent to enter into an agreement containing a picket line clause proscribed by Section 8(e).[4] The judge found that the clause violated Section 8(e) because it was so broad as to protect refusals to cross both primary and secondary picket lines. The judge nevertheless dismissed the complaint on the ground that the General Counsel did not establish that an object of the strike was to compel Pratt Towers to agree to the clause because the clause was never a topic of controversy during the negotiations.

The Board found that the Union's strike was undertaken in part to compel Pratt Towers to enter into a collective-bargaining agreement that contained a picket line clause prohibited by Section 8(e) of the Act. The Board concluded, contrary to the judge, that the Union's strike, therefore, had an object of forcing or requiring Pratt Towers to enter into an agreement proscribed by Section 8(e), even though the clause at issue had not been a topic of controversy during the negotiations. Consequently, the Board held that the Union's strike violated Section 8(b)(4)(ii)(A) of the Act.

B. Pratt Towers II

In *Pratt Towers, Inc.* 338 NLRB 61 (2002) (*Pratt Towers II*), the Board held, again contrary to the judge, that the Respondent was privileged to discharge and refuse to reinstate the striking employees because the strike in which they participated was unlawful from its inception.[5] *Pratt Towers II*, id. at 63–64.

However, the Board also held that in March, when the six former strikers sought to return to work, the Respondent violated Section 8(a)(3) and (1) by refusing to hire them unless they renounced their support for the Union. The Board reasoned as follows:

[1] On January 25, 2001, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Inasmuch as we agree with the aforementioned finding of coercive interrogation, and we adopt the judge's recommendation of appropriate relief for this violation, we need not pass on the Respondent's exceptions to the judge's findings of other coercive interrogations.

[3] All dates hereinafter refer to events occurring in 1999.

[4] The clause provided: "No employee covered by this agreement should be required by the employer to pass picket lines established by any Local of the Service Employees International Union in an authorized strike."

[5] In his September 2000 decision in *Pratt Towers II*, the judge was without the benefit of the Board's decision in *Pratt Towers I* that the employees' strike was unlawful. Based on his decision in *Pratt Towers I*, the judge found that the strikers were entitled to reinstatement.

> The Respondent's statements to the former strikers requiring them to abandon the Union amounted to so-called "yellow-dog contracts." [T]he Board has long held that it is unlawful for an employer to force or require its employees to sign yellow-dog contracts as the Respondent attempted here. We therefore conclude that, in these unique circumstances, the Respondent's refusal to employ the strikers violated Section 8(a)(3) and (1) of the Act. Accordingly, we shall require the Respondent to offer employment to these individuals with full backpay from the date that it unlawfully conditioned their employment on renunciation of the Union. [Id. at 64. Footnotes deleted.]

The Board's Order required the Respondent to offer the six employees "instatement to the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them." Id.

II. THE JUDGE'S DECISION IN THE CASE AT BAR

The present case involves events occurring during the autumn of 1999, while the Respondent was operating the apartment building with five new building service workers hired as *temporary* replacements for the striking employees. As the judge noted in his decision in the instant case, "It is undisputed that the replacement workers hired by the Respondent were temporary replacements and that the Respondent never permanently replaced the strikers." ALJD at sec. III,A,6.[6]

In correspondence with the Respondent in September and October, the Union requested that the Respondent resume bargaining to reach a contract. On October 15, the Respondent refused to do so on the ground that the Union had been bargaining in bad faith. The Union responded that its bargaining proposal had been modified to meet the objections of the Respondent, and queried on what basis the Respondent was refusing to bargain. The Respondent promised a prompt response.

In the meantime, on November 3, the Respondent called a meeting of the five replacement building service employees. Eunice Johnson, the Respondent's property manager, and John Porter, the vice president of the Respondent's board of directors, were present at the meeting, as were the five replacement employees.

The judge found that the November 3 meeting was a "'special' staff meeting held in response to the Union's request to resume bargaining[,]" and that "the Union was a main topic of conversation at this meeting." ALJD, sec. III,A,22, and sec. III,C,4. Porter told the replacement employees at this meeting that the Union wanted to resume bargaining with the Respondent, and that the Union's interest was in seeking the reinstatement of the striking employees and the concomitant dismissal of the replacement employees. Porter asked the employees if they wanted the Union to represent them. The replacement employees responded that they did not want the Union to represent them, so Porter told them to "put it down on paper." Either that day or the next day, the replacement employees drafted and submitted a decertification petition to the Respondent. On November 8, the Respondent withdrew recognition from the Union, stating that the Union no longer had majority support of the unit employees.

The judge held that the Respondent violated Section 8(a)(1) by coercively interrogating employees about their union sentiments at the November 3 meeting, and violated Section 8(a)(5) by withdrawing recognition from the Union. The judge concluded that the Respondent's withdrawal of recognition from the Union was unlawful for two reasons. First, relying on his finding in *Pratt Towers II* that the strike was protected, the judge reasoned that the Respondent may not withdraw recognition based on the sentiments of temporary replacement employees holding the positions of strikers who had been improperly denied reinstatement. See, e.g., *J. M. Sahlein Music Co.*, 299 NLRB 842, 850 (1990). Second, the judge stated that even if the sentiments of the temporary replacement employees should be considered in assessing whether the Union still enjoyed majority support of the unit, the Respondent's unfair labor practices in *Pratt Towers II* and *Pratt Towers III* tainted the temporary employees' apparent disaffection from the Union. See, e.g., *Pirelli Cable Corp.*, 323 NLRB 1009 (1997), enf. denied 141 F.3d 503 (4th Cir. 1998). Finally, the judge held that "the evidence raises a strong inference that the Respondent was involved in the creation of the [decertification] petition[,]" therefore tainting the petition itself as a basis upon which to withdraw recognition.

III. ANALYSIS

We agree with the judge that the Respondent violated Section 8(a)(1) by coercively interrogating the temporary replacement employees about their desire for continued union representation.[7]

[6] "ALJD" refers to the administrative law judge's decision.

[7] Chairman Battista and Member Schaumber note that in its exceptions the Respondent does not contest the substantive legal basis underlying the judge's 8(a)(1) finding. Rather, it excepts to the judge's decision to credit employee Serrano's direct testimony that the employees were asked at the November 3 meeting whether they wanted the Union to represent them. Chairman Battista and Member Schaumber agree

We also agree with the judge that the Respondent unlawfully withdrew recognition from the Union. Our agreement, however, is based on the rationale that the Union retained its majority status because the six former strikers had instatement rights due to the Respondent's unlawful refusal to hire them unless they abandoned support for the Union. Had the Respondent instated them, the five temporary replacement employees would no longer have been employed, and the Union would have retained its majority status. Moreover, even if the five temporary replacement employees had remained in the unit after the instatement of the six former strikers, the Union still would have continued to represent a majority of the unit employees.

The Respondent argues that it was privileged to withdraw recognition from the Union because its lawful discharge of the unprotected strikers substantially depleted the bargaining unit. The Respondent cites *Marathon Electric Mfg. Corp.*, 106 NLRB 1171, 1180–1182 (1953), enfd. 223 F.2d 338 (D.C. Cir. 1955), cert. denied 350 U.S. 981 (1956), where the employer lawfully discharged 546 out of 550 unit employees for engaging in an unprotected strike. The Board held that where the number of employees had been reduced to less than one percent of the unit, the unit no longer contained a substantial and representative complement of the employees, and therefore the employer did not violate Section 8(a)(5) when it withdrew recognition from the Union. The Respondent also relies on *Granite Construction Co.*, 330 NLRB 205, 208 (1999), where the Board similarly dismissed the allegation that the employer unlawfully withdrew recognition on the ground that lawful discharges resulted in a depletion of the unit. In addition, the Respondent contends that the petition signed by the replacement employees constitutes actual evidence of the Union's loss of majority status and that the judge erred in finding that it was tainted.[8]

The Respondent's reliance on *Marathon Electric* and *Granite Construction* is misplaced. In this case, unlike in *Marathon* and *Granite*, the former striking employees enjoyed instatement rights to their former positions as the result of the Respondent's discriminatory refusal to hire them, as found by the Board in *Pratt Towers II*. Indeed, at the time the Respondent withdrew recognition from the Union, the unit would have included the six former strikers, but for the Respondent's intervening unlawful refusal to hire them. This is so because, as the judge noted in the instant case, it is undisputed that the five replacement employees were temporary and not permanent replacements. The lawful discharge of the six strikers, therefore, did not deplete the unit as did the discharges of the strikers in *Marathon* and *Granite*, who had no reinstatement rights.

This analysis is supported by the Board's decision in *J. M. Sahlein Music Co.*, supra. There, the respondent withdrew recognition on the basis of the expressed sentiments of two employees hired as temporary replacements for two striking employees. The Board adopted the judge's finding that the respondent violated Section 8(a)(3) by refusing to reinstate the two strikers pursuant to the union's unconditional offer to return to work. The Board also adopted the judge's following finding that the respondent's withdrawal of recognition was unlawful:

> Disregarding the opinions of the temporary employees Monterrosa and Manual, who were improperly holding the positions of [unreinstated strikers] Hackett and Manzano, Respondent's evidence fails to show either an actual loss of majority support for the Union or evidence sufficient to support a good faith belief by Respondent that the Union had lost its majority support among nonsupervisory unit members, i.e., nonsupervisory permanent employees and strikers.

Sahlein, 299 NLRB at 849. Thus, the Board adopted the judge's holding that the determination of whether the union continues to enjoy majority status after unit employees engage in a strike, are temporarily replaced, and then are ordered reinstated, lies with the sentiments of the reinstated employees and not with the temporary employees.

We conclude that the rule of *Sahlein Music* applies here because the striking employees in both cases enjoyed similar rights to their former positions, albeit for different reasons. In *Sahlein Music*, the respondent had a legal duty to offer to reinstate the strikers at the conclusion of the strike. In this case, the Respondent had a legal duty to offer the employees it had unlawfully refused to hire instatement to the positions for which they applied, which were their former jobs. If the Respondent

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with the judge's credibility resolution (see fn.1) and, therefore, would adopt the judge's finding of a violation solely on this basis.

Member Walsh adopts the judge's 8(a)(1) finding for the reasons stated by him.

[8] The Respondent also argues that it was privileged to withdraw recognition because the Union bargained in bad faith by insisting to impasse and striking to force the Respondent to agree to certain illegal and nonmandatory subjects of bargaining. However, the strike ended in March 1999, when the employees offered to return to work. Therefore, the unlawful strike provided no justification for the Respondent's withdrawal of recognition many months later in November. Further, as the judge recognized in fn. 30 of his decision, even assuming that the Union bargained in bad faith, that would only privilege a suspension of the Respondent's bargaining obligation, not a withdrawal of recognition. See *Inland Tugs v. NLRB*, 918 F.2d 1299, 1310–1311 (7th Cir. 1990) (rejecting similar argument that union's unlawful bargaining conduct privileged the employer's direct dealing).

had fulfilled this legal obligation, the concededly temporary replacement employees would no longer have been employed. As a result, when the Respondent thereafter withdrew recognition from the Union, the unit would have consisted of only the six former employees, whose support for the Union was unquestionable.[9] They had, after all, refused the Respondent's unlawful offer to hire them only if they abandoned the Union. Under these circumstances, the Union would have continued to enjoy the support of all the unit employees, and there would have been no basis whatsoever for withdrawing recognition from the Union.[10]

We have found that the temporary replacements would no longer have been employed, had the Respondent not unlawfully refused to hire the six discharged strikers. We have also found that under *Sahlein Music* the antiunion sentiments of the replacements should not be counted. We note, however, that even if the Respondent would have retained the five replacement employees upon the instatement of the six former employees, the Respondent still would not have been legally entitled to withdraw recognition from the Union.[11] The unit then would have consisted of eleven employees—the six instated employees and the five replacement employees. We will assume arguendo that the five replacement employees' antiunion sentiments were untainted by the Respondent's conduct. The Union, however, would have enjoyed the support of the six former employees, constituting a clear majority of the bargaining unit. Under these circumstances, the Respondent would not have established either actual loss of majority support or good-faith reasonable uncertainty about the Union's continuing majority status.[12] See *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).

[9] The former strikers were due instatement as early as March. The Respondent withdrew recognition in November.

[10] Cf. *Freeman Decorating Co.*, 336 NLRB 1, 13 (2001). (*Granite* and *Marathon* are inapplicable, and union's majority status is not adversely affected, in cases in which the Respondent's depletion of the bargaining unit violates Sec. 8(a)(3); subsequent withdrawal of recognition violates Sec. 8(a)(5)).

Because we find that the Respondent's withdrawal of recognition from the Union was unlawful as a result of the instatement rights of the former employees whose hire the Respondent unlawfully conditioned on abandonment of the Union, we find it unnecessary to pass on the judge's conclusion that the replacement employees' decertification petition was tainted by the Respondent's unlawful conduct.

[11] In agreeing with his colleagues that the Respondent unlawfully withdrew recognition from the Union, Member Walsh finds it unnecessary to rely on this alternative rationale, which assumes that the Respondent would have retained the temporary replacements after instating the six former strikers.

[12] Chairman Battista agrees only with this latter rationale. Although the Respondent was under an obligation to instate the six discriminatees, it was under no obligation to discharge the five working employees. And, there is no evidence that Respondent would have done so. Accordingly, Chairman Battista assumes arguendo that the five would have been retained. The Union would nonetheless have had a majority among the 11 employees.

ORDER

The National Labor Relations Board orders that the Respondent, Pratt Towers, Inc., Brooklyn, New York, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from Local 32B–32J, Service Employees International Union, AFL–CIO (the Union), as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth below.

(b) Coercively interrogating its employees about their union sentiments and those of others.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part-time building service employees employed by the Respondent at 333 Lafayette Avenue, Brooklyn, New York, excluding all guards and supervisors as defined in Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall by taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

[13] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to all current employees and former employees employed by the Respondent at any time since November 3, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from Local 32B–32J, Service Employees International Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth below.

WE WILL NOT coercively question you about your union sentiments and those of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full time and regular part-time building service employees employed by us at 333 Lafayette Avenue, Brooklyn, New York, excluding all guards and supervisors as defined in Section 2(11) of the Act.

PRATT TOWERS, INC.

Nancy K. Reibstein, Esq., for the General Counsel.
Kevin J. McGill, Esq. and *Jennifer M. Crook, Esq. (Clifton, Budd, & DeMaria, LLP)*, for the Respondent.
Ira A. Sturm, Esq. (Raab, Sturm, & Goldman, LLP), for the Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed by Local 32B-32J, Service Employees International Union, AFL–CIO (the Union or 32B-32J) on October 1, 1999, in Case 29–CA–23012 against Pratt Towers, Inc. (the Respondent), a complaint and notice of hearing was issued on November 19, 1999, alleging that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about information relating to, and in preparation for, a then pending unfair labor practice hearing in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666 (the prior CA cases), thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act. By answer timely filed the Respondent denied the material allegations in the complaint in Case 29–CA–23012.[1]

Upon the basis of a charge and amended charge filed by the Union on November 19 and December 23, 1999, respectively, against the Respondent in Case 29–CA–23137, a complaint and notice of hearing was issued on January 31, 2000, alleging that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the bargaining unit employees and by failing and refusing to bargain in good faith with the Union. By order dated January 31, 2000, Cases 29–CA–23012 and 29–CA–23137 were consolidated for the purposes of trial. The Respondent timely filed its answer in Case 29–CA–23137 on February 24, 2000.[2] In its answer the Respondent raised the following affirmative defenses: (1) that the complaint allegations are barred by Section 10(b) of the Act; (2) that the Union does not represent a majority of the unit employees; (3) that the Union has bargained in bad faith since August 1999, "by insisting to impasse and by striking to obtain illegal and non-mandatory contract terms, and by engaging in intractable 'take-it-or-leave it' bargaining with respect to mandatory terms and conditions of employment. The Union is still acting in bad faith by insisting that Pratt agree to an illegal subcontracting provision and an illegal union security clause. The foregoing conduct, covering a period of eighteen months, precludes the Union and the General Counsel from testing Respondent's good faith"; and (4) that since on or about February 22, 1999, the Union, a persistent violator of the Act has embarked on a course of violent and destructive behavior and

[1] The Respondent, however, in its answer admitted that, "Eunice Johnson has held the position of property manager and has been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent, but denies that Johnson is an agent for all purposes."

[2] By its answer in Case 29–CA–23137 the Respondent again admitted the status of Eunice Johnson as a statutory supervisor and agent of the Respondent but not as "an agent for all purposes." The Respondent also admitted that on or about November 8, 1999, it withdrew its recognition of the Union as the exclusive bargaining representative of the unit employees and since that time has failed and refused to recognize and bargain with the Union. However, the Respondent denies that by such conduct it has engaged in unfair labor practices within the meaning of Sec. 8(a)(1) and (5) of the Act.

"therefore attempts at good faith bargaining with it, would be futile."

A hearing in this matter, was held before me in Brooklyn, New York, on April 10, 13, and 14, 2000. At the trial, I granted the General Counsel's motion, over opposition by the Respondent, to consolidate Cases 29–CA–23012 and 29–CA–23137, with prior Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666. These latter cases having been previously tried before me,[3] denied the General Counsel's motion to strike the Respondent's affirmative defenses raised in its answer in Case 29–CA–23137; and denied the Respondent's motion to revoke the General Counsel's subpoenas in Case 29–CA–23137.

Moreover, at the end of the trial, I granted the General Counsel's motion to amend the complaint, over the objection of the Respondent, to further allege that, "on November 3, 1999, Respondent, by Eunice Johnson and John Porter, unlawfully interrogated employees about their union sentiments in violation of 8(a)(1) of the Act." I offered the Respondent an adjournment if needed to prepare its case with regard to any defense of the above amendment to the complaint. The Respondent's counsel declined the offer. However, in its brief, the Respondent asserts that it was "denied due process including fair notice and an opportunity to defend."

Subsequent to the closing of these consolidated cases, the General Counsel, the Respondent, and the Union filed briefs in Cases 29–CA–23012 and 29–CA–23137.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Pratt Towers, Inc., a New York corporation, is engaged in the operation of a 23 story, 326 unit residential cooperative apartment building, located at 333 Lafayette Avenue, Brooklyn, New York, also its principal office and place of business. During the past year, the Respondent, in the course and conduct of its business operations derived gross revenue in excess of $500,000, and purchased and received at its Brooklyn facility, goods, supplies, and materials valued in excess of $5000 directly from points located outside the State of New York. The consolidated complaints allege, the parties admit, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[3] See order dated April 6, 2000 (ALJ Exh. 5). It should be noted that the parties submitted separate briefs in Cases 29–CA–23012 and 29–CA–23137 addressing the specific issues in these cases. A separate decision JD(NY)–64–00 was issued by me previously on September 27, 2000, regarding those issues involved in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666. In view of this, I sever Cases 29–CA–23012 and 29–CA–23137 from the prior CA cases for the purposes of this decision.

The Union joined in the General Counsel's motion to consolidate these cases and further requested that the record in the earlier matter be reopened. I denied the Union's request to reopen the prior record in the earlier cases.

II. THE LABOR ORGANIZATION INVOLVED

The consolidated complaints allege, the parties admit, and I find that Local 32B-32J, at all times material, has been a labor organization within the meaning of Section 2(5) of the Act.

The complaint in Case 29–CA–23137 alleges, the Respondent admits,[4] and I find that at all material times, the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in the following unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time building service employees employed by Respondent at its 333 Lafayette Avenue, Brooklyn, New York, facility, excluding all guards and supervisors as defined in Section 2(11) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The complaint in Case 29–CA–23137 alleges that on or about November 8, 1999, the Respondent withdrew its recognition of the Union as the exclusive bargaining representative of the Respondent's employees in an appropriate unit and has failed and refused to recognize and bargain with the Union thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. The Respondent denies these allegations.

1. The evidence

At all material times, Eunice Johnson has held the position of the Respondent's property manager. The record establishes that Johnson manages the day-to-day operation of the Respondent's facility and exercises significant authority with respect to the maintenance employees' terms and conditions of employment. Johnson supervises the daily activities of the maintenance staff, disciplines employees, recommends employee promotions, hires employees, and recommends employee terminations to the Respondent's board of directors. For the reasons fully set forth in my decision in the prior cases (Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666) (JD(NY)–64–00), I find that at all material times, Eunice Johnson has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent, acting on its behalf. The evidence herein also establishes that the Respondent's board of director's vice president, John Porter, as an agent of the Respondent acting on its behalf.

Prior to being terminated by the Respondent on March 16, 1999, the Respondent employed six long-tenured building service employees, including Curtis Bailey, Theorgy (Theo) Brailsford, Lawrence (George) Folkes, Keith Robinson, Jude Obaseki, and Angel Venzen.

2. Background

On April 7, 1998, by secret-ballot election, the Respondent's then maintenance staff (eight employees) unanimously voted to

[4] The Respondent admits that the Union has been the designated exclusive collective-bargaining representative of its employees only from May 1998 through March 23, 1999. However, the Respondent denies that, at all material times the Union, by virtue of Sec. 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in the appropriate unit.

oust the incumbent union, Local 2, and voted to be represented by Local 32B-32J. The Union was certified as the employees' exclusive bargaining representative on April 21, 1998. As found by me in my prior decision, JD(NY)–64–00, the Respondent was very concerned that their employees had elected the Union as their bargaining representative because it felt that the Union's wage and benefit proposals would be too costly. This is corroborated by the minutes of the closed board of director's meeting of April 27, 1998. At this board meeting and that of August 11, 1998, it was proposed that if possible, the Respondent rid itself of Local 32B-32J by dragging out negotiations with the Union until the end of the certification year thus depriving the employees of their medical insurance, offer the employees a good salary and health benefits to keep them out of the Union, or in the alternative, get them a different union more amenable to the Respondent.

The Respondent and the Union met on four separate occasions: August 26, September 24, October 27, 1998, and January 7, 1999, to negotiate a collective-bargaining agreement. Ira Sturm, Esq., counsel for the Union, was its chief negotiator and sole participant for the Union in the negotiations. The Respondent's principal spokesperson at the negotiations, was its labor counsel, Kevin McGill, Esq., Eunice Johnson also attended all the bargaining sessions with McGill. However, with the parties reaching an impasse in negotiations on January 7, 1999, the employees commenced a strike against the Respondent on February 22, 1999.

On March 11 and 15, 1999, the six striking employees, Bailey, Brailsford, Robinson, Folkes, Obaseki, and Venzen, made unconditional offers to return to work to the Respondent. It is undisputed that the replacement workers hired by the Respondent, were temporary replacements and that the Respondent never permanently replaced the strikers.

The record evidence, in the prior CA cases, including the testimony of the Respondent's own witnesses, establishes that the Respondent, as a condition of reinstatement, insisted that the striking employees withdraw their membership and sever all ties with the Union and obtain written proof from the Union that it no longer represented these employees.

On March 16, 1999, the Respondent held an emergency closed meeting of its board of directors and the Respondent's counsel, Kevin McGill. The record shows that the Respondent made its determination, at this meeting, not to reinstate the strikers, and not to accept their unconditional offer to return to work, for the purported reason of their "misconduct" and apparently before the Respondent had concluded, or even started any realistic investigation into alleged striker "misconduct."[5]

After the Respondent's March 16 decision to terminate the striking employees, and having been advised by its counsel, McGill, that its accusations of strike misconduct was "questionable," "not concrete," and "not sufficient." McGill began, for the first time, to carefully "examine the contract [Independent Apartment House Agreement of 1997] at length," from which the parties had been negotiating, after which he formed the opinion that the strike was illegal and unprotected, and therefore, the Respondent's decision to refuse reinstatement and to terminate the strikers was lawful.

By letter dated March 24, 1999, the Respondent advised each striking employee that they were being fired for the reasons that the strike was not a protected strike and because the strikers engaged in "serious misconduct during the course of the strike."

In my prior decision in the first hearing in, the CA cases,[6] I found that the Respondent had failed to carry its burden of establishing its affirmative defense that it lawfully terminated the striking employees because of their strike misconduct.[7] The record evidence shows that the Respondent made its decision to terminate, and did terminate the striking employees, on March 16, 1999, before it conducted any real investigation of alleged striker misconduct. It is undisputed, that the Respondent terminated the strikers without ever telling any of them what specific acts of misconduct they were accused of, and without giving any of them the opportunity to tell their side of what occurred. Moreover, the Respondent ultimately admitted that three of the striking employees, Curtis Bailey, Lawrence Folkes, and Jude Obaseki, did not engage in any misconduct at all. The only misconduct alleged to have been committed by Angel Venzen was his turning off the boiler and whether this act was one of misconduct was found by me to be highly questionable or to be any misconduct at all. The strike misconduct incidents alleged against the remaining strikers Theo Brailsford and Keith Robinson, even if true, was found by me not to be serious enough to remove these employees from the protection of the Act and deny them reinstatement.[8] Finally, the Respondent admitted that the allegation of striker misconduct might be an insufficient basis upon which to deny the striking employees reinstatement, as its attorney, Kevin McGill, had advised the Respondent's board of directors, at one time.

Thus, the evidence established that the alleged acts of striker misconduct, either, did not occur, were not committed by the strikers themselves, or, in any event, did not constitute conduct serious enough to justify denying reinstatement or terminating these striking employees. Interestingly, some of the Respondent's witnesses testified in an instance of reflection, that the only reason the Respondent denied the striking employees reinstatement was because they failed to withdraw their support from and sever their ties with the Union and produce written evidence of this fact.

Additionally, in my prior decision JD(NY)–64–00, I found that the Respondent had also failed to carry its burden regarding its affirmative defense that it had refused to reinstate the striking employees because the strike was unprotected. The record evidence therein shows that the Respondent did not even begin to examine the Independent Agreement for possible unlawful or nonmandatory clauses until after it made its decision to terminate the strikers. Moreover, the evidence further establishes that the Respondent agreed to most of the contract

[5] This is supported by the tapes and minutes of the March 16 meeting in evidence and by some of the testimony of the Respondent's own witnesses. See JD(NY)–64–00.

[6] JD(NY)–64–00.

[7] Nothing in this present hearing influences any change in that determination.

[8] JD(NY)–64–00.

provisions that it later claimed were unlawful or nonmandatory.[9] Finally, in Case 29–CC–1285, I found that the Union did not insist upon a contract provision that the Respondent complained of, the "picket line clause," and although, as stated therein, this clause violated Section 8(e) of the Act, that the Union did not strike with the object of forcing the Respondent to agree to this provision. See JD(NY)–40–00.

As established by the record evidence, in my prior decision, JD(NY)–64–00, I found that the Respondent's affirmative defenses of striker misconduct and that the strike was unprotected, were either not in truth relied on, merely pretextual in nature and/or that the Respondent failed to carry its burden of proof, therein sufficient to justify its failing and refusing to reinstate the striking employees, and therefore the Respondent by its actions violated Section 8(a)(1) and (3) of the Act.

Moreover, as also found by me in my prior decision in JD(NY)–64–00:

> Based upon the record evidence, it is clear that the Respondent did not want Local 32B-32J as its employees collective-bargaining representatives because it was too costly. Faced with the Board's certification of the Union as its employees bargaining representative, the Respondent embarked on a plan to rid itself of this Union by engaging in a predetermined course of conduct designed to undermine the status of the Union with the employees. The Respondent never intended to bargain in good faith, dragging out the negotiations until the certification year was up, instigating the employees to consider a different union, requiring them to get letters disassociating themselves from the Union in order for reinstatement and, raising unsupportable and even pretextual reasons for denying the men their jobs back in the hope the Union and the striking employees who supported it would "walk away."

3. What occurred thereafter

By letter dated September 30, 1999, Sturm wrote to McGill requesting that the parties resume bargaining, and asked whether the Respondent's last offer was still on the table. McGill responded by letter to Sturm dated October 7, 1999, in which McGill asked, whether the Union purported to represent the temporary replacements, and whether the Union was asserting that the temporary replacements were now permanent replacements. Sturm replied, in a letter dated October 8, 1999, in which he posed the following question:

> If the current complement continues to be staffed by temporary replacements, how does a permanent employee, who is being temporarily replaced, obtain reinstatement to his former position?

By letter dated October 13, 1999, Sturm requested that the Respondent meet with the Union "to negotiate terms and conditions of employment of the certified unit of building service employees employed by Pratt Towers." In addition, Sturm in this letter wrote:

> To the extent Pratt objects to the picketing clause, please be advised that the word "lawful" should be added (assuming the clause was not previously understood to encompass only lawful picket lines).
>
> To the extent Pratt objects to references to the Realty Advisory Board in the arbitration clause, please consider all references thereto deleted. The Union proposed the panel of arbitrators presently sitting as the arbitrators for the life of the agreement.

McGill, by letter dated October 15, 1999, to Sturm, refused to meet and bargain with the Union stating therein:

> it is the belief of Pratt Towers that the totality of the circumstances, including your letters of October 8th and October 13th, shows that Local 32B-32J has and continues to bargain in bad faith with respect to the unit in question. Accordingly, we believe that we have no duty to meet and confer with the Union and we decline to do so.[10]

By letter dated October 19, 1999, from Sturm to McGill, Sturm requested clarification "as to what permissive and or illegal subjects still remain on the table." Sturm mentioned that the Respondent's concerns relating to the Realty Advisory Board in the arbitration clause and the picketing clause had been addressed in his earlier letter, leaving the "Evergreen Clause," which the Respondent objected to its inclusion in the proposed bargaining agreement. Sturm stated that while McGill had not cited any authority to suggest that the Evergreen Clause was unlawful as proposed, Sturm offered therein, alternative language for the length of the Agreement for that clause. Moreover, Sturm also offered that all references to the Realty Board be eliminated from the proposal and withdrew article VIII,(2), dealing with fund contribution increases, replacing it with newly proposed language.

McGill acknowledged receipt of Sturm's October 19, 1999 letter, by letter dated October 27, 1999, stating that he had referred Sturm's letter to the Respondent and "we will respond to it by next week."

4. The November 3, 1999 meeting

Eunice Johnson testified that pursuant to the Union's September 30, 1999 request for the resumption of negotiations the Respondent knew that it had to "get back to the Union and let them know . . . when we could sit down, so we had to respond immediately." Before responding to the Union's request to bargain, the Respondent, by memorandum dated October 26, 1999; notified the "temporary maintenance staff" of a mandatory staff meeting scheduled for October 27, 1999. The meeting was canceled due to the unavailability of board of director's vice president, John Porter, the Respondent's liaison with the maintenance employees, and was actually held on November 3, 1999. Present at this meeting were Porter, Johnson and the five

[9] Additionally, as evidenced by the record in the present cases, the Union made subsequent efforts to establish negotiations with the Respondent. While Sturm sought to address those items in the agreement, which he believed the Respondent had raised as its concerns, the Respondent, notwithstanding this, still refused to recognize and to bargain with the Union or make any counteroffers, merely accusing the Union of bargaining in bad faith.

[10] In his letter McGill cited *Times Publishing Co.*, 72 NLRB 676, 683 (1947); *Roadhome Construction Corp.*, 170 NLRB 668, 672–673 (1968); *Nassau Insurance Co.*, 280 NLRB 878 fn. 3 and 891–892 (1986); and *Chicago Tribune Co.*, 304 NLRB 259, 260–261 (1991).

temporary replacement maintenance employees, Anibal Soriano, Daryl Thomas-Bennett, Gregory Rouse, James Gibbs, and Miguel Serrano.[11]

Johnson initially attempted to portray the November 3 meeting with replacement employees as a "regular" staff meeting. However, the evidence establishes that the Respondent, even if it did conduct regularly scheduled staff meetings with the replacement workers, that this meeting was a "special" staff meeting held in response to the Union's request to resume bargaining.[12]

Temporary replacement employee Miguel Serrano testified that during the course of his employment, which began in April 1999, the Respondent had conducted only one other staff meeting. Serrano added that the November 3 meeting was the first maintenance staff meeting during which the Union was discussed.

Johnson testified that Porter began the meeting by discussing concerns raised by the employees or the tenants regarding maintenance issues.[13] During his testimony, Serrano at first testified that he could not remember any "maintenance issues discussed at this meeting other than the union issue." However, on cross-examination, Serrano recalled that there was a discussion at the beginning of the meeting regarding, "problems on the job" with acting supervisor, Anibal Soriano.

Johnson testified that Porter now told the employees that he wanted to bring them up to date regarding the Union and where the Respondent stood. Porter advised the employees that the Respondent had received a letter from the Union stating that the Union wished to continue negotiations, referring to the September 30, 1999 letter from the Union.[14] Johnson stated that Porter then told the employees that "Respondent did not want anything from the employees" but was just there to let them know what was happening with the Union.[15]

Johnson testified that both she and Porter told the temporary employees that the Respondent believed that during renewed negotiations, the Union would demand that the striking employees be reinstated and that the Union would seek the dismissal of the temporary replacement employees.[16] Johnson admitted that prior to the November 3, 1999 meeting neither she nor the Respondent had any communication with the Union to ascertain what the Union's bargaining position would be, vis-à-vis the temporary replacement employees, and that she had no knowledge, other than the Union's position taken at the prior trial, that the Union would take the position about their termination that she and Porter had advanced to these employees.

Johnson testified that after telling the employees again that "he is not asking them to do anything," Porter told the temporary employees "that the Union was now claiming to represent them, the replacement workers." Johnson stated that one of the employees said that they did not know anything about the Union and asked how the Union could be making a claim to represent them when the Union had not even contacted them. Johnson related that Porter again said that "we're just here to advise you as to the latest of where we stand at this point. We're not asking you to do anything . . . just to let you know what's going on." Johnson testified that Porter told the employees that as replacement workers, they had legal rights too, and that if any of the employees were interested in learning their rights, the employees could go see Johnson, who would make the information available to them.

Serrano testified that after Porter had informed the employees that the Union was now claiming to represent them, he told Porter, "I don't want to be represented by them because they're representing the other guys. . . . I told him I didn't want them to represent us." Serrano stated that "when John Porter told us about the union representing us, we made up our mind right there, and he just said put it on paper." Serrano continued that "we told him what we wanted to do" and Porter said that he needed "[s]ome signatures because we told him, that we didn't want to be represented, so we had to put it down on paper." While Serrano later testified that neither Porter nor Johnson asked the employees at the November 3 meeting anything concerning whether or not they wanted to be represented by the Union, Serrano at first testified on his direct testimony that Porter said:

[11] While the Respondent called property manager, Eunice Johnson, and temporary replacement employee, Miguel Serrano (mistakenly identified as Miguel Sariano, at times, in the record), to testify about the November 3, 1999 mandatory staff meeting, board of director's vice president, John Porter, was not called as a witness. Porter did testify in the prior "CA" cases, but his testimony did not include information regarding the November 3, 1999 meeting, since the hearing in the prior matter ended on August 13, 1999.

[12] In this regard, during cross-examination, Johnson testified that, although she tries to attend all maintenance staff meetings, she did not know when the Respondent had last held a staff meeting.

Johnson also testified that, because the Union had requested a date to resume bargaining, "that was one of the reasons that, at that maintenance meeting, we brought it to the replacement workers' attention." Johnson stated that during this meeting, Porter told the employees that the Respondent had to get back to the Union regarding its request to resume bargaining. However, Serrano denied that Porter had told this to the employees.

[13] However, Johnson was unable to recall any specific purported "concerns" nor any details or even the general subject matter of any topic discussed during the November 3 meeting except, "The concerns was from the residents as to cleanliness and some—it was all maintenance and building issues. Now, if you ask me exactly what they were, name them item by item, Your Honor, I cannot do that." This was in contrast to her detailed testimony concerning what was discussed regarding the Union.

[14] Serrano denied that Porter had said this to the employees.

[15] Serrano's testimony is enlightening:

> Q. When Mr. Porter said something to the effect that we're going to tell what happened with the union, the union wants to represent you, do you remember him saying we're not asking you to do anything?
>
> A. No, I don't remember that.

[16] Serrano at first testified that Porter did not say that it was his and Johnson's belief that the Union was going to try to get the temporary maintenance employees fired and the strikers reinstated. Serrano later testified that while Porter did not mention anything about the striker's reinstatement, Porter did say that "[i]f they was to win the case, we would lose our jobs because we were only there temporary. He made it clear that we were there temporary."

> Like, I said, [Porter] told us that the union wanted to represent us, what do we think, do we want them to represent us or not. So I told him I didn't want them to represent us.[17]

5. The employee petition

Serrano testified that after the meeting the five temporary replacement employees met in the breakroom in the basement of the Respondent's facility "the next day," which would be November 4, 1999, between 2 to 3 p.m., and "had a little talk, and we all agreed," presumably as to whether or not they wanted to be represented by the Union. According to Serrano, no one other than the five maintenance staff employees were present at this meeting.

However, Johnson testified that after the November 3 meeting ended at approximately 5–5:10 p.m., she returned to her office, and at about 5:30–5:35 p.m., she believed it was replacement employee "Miguel Sariano"[18] who came to her office. "Sariano" told Johnson that the men "just spoke among ourselves, and we don't want this union to represent us." Johnson stated that she told Miguel that if this is what they wanted "you simply tell me that in writing. . . . Just tell me you don't want to be represented by the union." Johnson related that Miguel then left her office and maybe, 10 minutes later returned and presented Johnson with "this piece of paper" telling Johnson, "The men have agreed and here it is in writing, as you requested." "Sariano" then left Johnson's office. Johnson testified that when "Sariano" handed her the petition she was in the midst of doing something and "didn't really look at it to see if all the I's and T's was [sic] dotted and crossed." When Johnson later looked at the document she noticed that there were only four signatures on it. "Miguel Sariano's" signature was not on the petition. Johnson then made a copy of the petition and faxed it to the Respondent's attorney, Jennifer Crook, and placed the original in her file.[19]

The handwritten document states:

> To John Porter & Eunice Johnson
>
> We the employees of Pratt Towers, Inc. do not want to be represented by 32B-32J
>
> Very Truly Yours
>
> | | |
> |---|---|
> | 1—Anibal R. Soriano | November 4, 1999 |
> | 2—Daryl T. Bennett | November 4, 1999 |
> | 3—James D. Gibbs, Jr. | November 4, 1999 |
> | 4—Gregory M. Rouse | November 4, 1999 |

While Johnson testified that she did not speak to any employees apart from "Miguel Sariano," she also stated that she had been assured by other employees that Serrano, whose signature was not on the petition would sign it the next day.

Johnson testified that after viewing the petition and noticing only four employee signatures on it, the next day she "went to Miguel and I mentioned it to him, since it was Miguel that came to me. I was like, I have everybody's signature except yours. Are you sure this is what you guys want to do." Miguel Serrano, the employee Johnson had approached, told her he would get back to her, and as Johnson testified, "[D]uring the course of the day Miguel returned to me with a second letter."

In testimony as confusing and contradictory as can be concerning how the temporary replacement employees petition came into being, as testified to by both Serrano and above by Johnson, Serrano testified that on November 4, 1999, the employees wrote four different petitions. He stated that Gregory Rouse temporary employee had written the body of the petition. Serrano testified:

> That was at the end of the day. Everybody was in a rush to leave because we had wrote up four of these. I wrote up the first one, and I think James took it upstairs to Ms. Johnson. And my handwriting was a little too fancy, so we threw that one away. And Greg—Daryl wrote up the next one, and that wasn't good because he got sloppy handwriting. And Greg wrote those two, and I signed this one, three of them. Two of them wasn't good. We threw those away, and for some reason, I didn't get this one to sign.

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[17] Additionally, Serrano was asked:

> Q. And after Mr. Porter told you that the union wanted to represent you, he asked you and the other employees if you, wanted to be represented by 32B-32J or not, is that correct?
> A. Yes.

Interestingly at first Serrano had answered that Porter had asked the employees if they wanted to be represented by the Union. But after counsel for the General Counsel sought to amend the complaint to allege unlawful interrogation in violation of Sec. 8(a)(1) based on Serrano's testimony and then indicated her intention to reserve the amendment to the end of the hearing, Serrano suddenly changed his testimony to deny this.

[18] The record is unclear, and confusing, as to who came to Johnson's office and actually gave her the first petition. Johnson testified it was "Miguel Sariano." However, there was no employee named Miguel Sariano. Employed were Anibal Soriano and Miguel Serrano. Serrano denied having given the first petition to Johnson following the November 3 meeting. There is also evidence that Serrano left work early for a doctor's visit that day.

[19] It should be noted that while Johnson testified that she unequivocally received this copy of the temporary replacement employees petition in the late afternoon of November 3, 1999, the employee signatures thereon are dated "November 4, 1999." Moreover, at the trial both Johnson and the Respondent's trial counsel, Jennifer Crook, Esq., unambiguously represented, to the court that the Respondent did not have nor could it locate the original petition. After the General Counsel learned that a copy of the original petition had been faxed to the Respondent's counsel, at the request of General Counsel, I directed the Respondent to produce this fax cover sheet. The next morning the Respondent's counsel, Jennifer Crook, turned over the fax transmittal sheet and attached to it was the original petition, the fax transmittal sheet being dated November 4, 1999. The "Remarks" section of the fax transmission cover sheet from Johnson to Crook states, "Jennifer signatures of one employee is missing as he left work early for a doctor's appointment. However, the other employees has assured me that he is in totally agreement and will sign same tomorrow at which time I will refax." The parties stipulated that the Respondent's counsel received a two-page fax from Johnson on Thursday, November 4, 1999, at 6:29 p.m. (fax and original petition with four employee signatures) and that the Respondent's counsel received a two-page fax document from Johnson on Monday, November 8, 1999, at 6:02 p.m. (fax and original petition with five employee signatures).

6. The Respondent's offer of benefits

The evidence shows that the Respondent intended to offer, and did offer, medical insurance benefits to the temporary replacement workers, effective November 1, 1999, just 2 days before the Respondent's mandatory staff meeting on November 3 and 1 week before the Respondent withdrew recognition from the Union. In addition, during a special closed board of director's meeting on October 5, the Respondent agreed to grant the replacement workers a 3-percent wage increase, effective on the employees' anniversary dates of March and April 2000.

During the Respondent's October 12 board meeting, the Respondent discussed the possibility that there would be a delay in being able to provide the temporary employees medical benefits by their target date of November 1. The Respondent conducted another special closed board meeting on October 19, during which the board voted to accept Aetna U.S. Health Care Value plus HMO health care plan including dental for the maintenance staff, effective November 1. The Aetna/US Health Care Enrollment Request forms for each of the temporary replacements were dated October 21, 1999. Johnson testified that because she was not present when the employees completed and signed these forms, she did not know when this was accomplished.

At the October 26, closed board of directors meeting, the Respondent announced that the health coverage for the maintenance staff would be effective November 1. Also during the October 26 board meeting, the board scheduled a mandatory maintenance staff meeting for the following day, October 27. Although a Memorandum went out to the temporary replacement staff on October 26, informing them of the mandatory maintenance staff meeting scheduled for October 27, this meeting was canceled and was held 1 week later, on November 3.

Johnson testified that prior to the November 3 meeting, the Respondent informed the temporary replacement employees that the Respondent was going to provide them with medical insurance. During cross-examination, Johnson testified that she did not recall whether medical insurance was discussed during the November 3 maintenance staff meeting. However, Johnson also testified that during the November 3 meeting, Miguel "Sorriano" (Serrano) might have asked about the status of the employees' health insurance. Miguel Serrano testified that some time at the end of October, the Respondent, through Eunice Johnson, told Serrano that the Employer was going to provide him with health insurance.

7. The withdrawal of recognition from the Union

While McGill, in his October 27 letter to Sturm, stated that the Respondent would reply within 1 week to the Union's October 19 request to bargain, Sturm received no response from the Respondent. Therefore, Sturm wrote to McGill again on November 8 in which he summarized recent events between the parties, demanded reinstatement of the striking employees, and noted that the Union responded to and modified each item that the Respondent claimed were either permissive or illegal subjects of bargaining. Sturm further stated that the Union believed that the Respondent continued to engage in violations of Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith.[20]

McGill responded to Sturm's November 8 letter that very same day. In the letter the Respondent withdrew recognition from the Union, stating that the Union does not possess majority status among the employees asserting, "The strikers are no longer employees of Pratt Towers as they have been terminated for misconduct and for participating in an illegal strike. The Union does not possess majority states among the replacement employees. Accordingly, we respectfully decline to bargain with the Union as to do so would violate Section 8(a)(2) of the Act."

McGill in his November 8 letter also disagreed with Sturm that "the Union has removed each obstacle claimed to be unlawful by Pratt," raising the subcontracting clause in the Union's proposal and a security bond requirement as a condition for any agreement. McGill then states, "This would privilege Pratt to refuse to meet with the Union even if the Union possessed majority status among the employees."

By letter dated December 23, 1999, Sturm mentioned that McGill had never raised the issue of the security bond during negotiations as being a problem but anyway Sturm made it clear that the security-bond clause "is not a precondition to the entering into any agreement." Sturm then requested the resumption of bargaining with the Respondent.

8. Credibility

As to the credibility of the respective parties' witnesses here in this entire case, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). The testimony of the Respondent's witnesses called during the current trial, Eunice Johnson and Miguel Serrano was extremely contradictory, inconsistent, defensive, and evasive. Their demeanor was uncooperative at times giving unresponsive answers and their testimony highly contradicted each others. I have rarely seen witnesses who proved to be as unreliable and suspect as to their testimony.

Moreover, pursuant to subpoena, the Respondent was required to produce all cassette tapes of its board of directors meetings from the close of the previous hearing in August 1999 through the present. The Respondent turned over all tapes except for those from September through October 1999. The missing tapes correspond to the critical period during which the

[20] Sturm, in his November 8, 1999 letter states:

> By letter dated October 13, 1999, I attempted to remove from the table those issues that you believed to be "unlawful." . . . by letter dated October 19, 1999, I made it quite clear as to Local 32B-32J's position vis-à-vis the issues you believed to be "permissive" or "illegal" subjects of bargaining. All of the questioned issues were removed from the table. Pratt can no longer assert that the Union is bargaining in bad faith, as the Union has removed each obstacle claimed to be unlawful by Pratt, regardless of the validity of the assertion.

Union requested to resume bargaining and the Respondent made its decision to withdraw its recognition from the Union. No explanation was given as to why these tapes were missing.[21]

Betty Ford, the Respondent's recording secretary, testified that the Respondent tapes all of its board of directors' meetings. Ford stated that after transcribing the tapes and preparing minutes of the meetings, she keeps the cassettes in a plastic bag in her home until it is filled with 20–30 tapes, at which time she brings the bag with the tapes to the Respondent's board room. Ford related that she last brought a full bag of tapes (June through November 1999 tapes) to the board room sometime in November or December 1999 which she left on a desk in the board room with the intent to return later to place it in an unlocked file cabinet where it is usually stored. She stated that she never returned to do this. The Respondent offered no explanation as to how only the critical tapes, those that would have allegedly supported the written minutes and recorded the Respondent's deliberative and decisionmaking processes regarding how to respond to the Union's request for bargaining, disappeared from the bag containing the 20–30 tapes.

Because of the lack of credibility of the Respondent's witnesses, Johnson and Serrano, I cannot accept the Respondent's implication that because it has supplied the General Counsel with minutes of these supposed meetings, "what could possibly be in those tapes that bear upon the issue that is before your honor?" The mysterious, unexplained disappearance of those particular tapes always in the possession of the Respondent, gives rise to the inference that they would contain material not supportive of and adverse to the Respondent's defenses, in particular, the defense that the temporary replacement employees decided, on their own and without any coercion or interference from the Respondent, to decertify the Union. See *FPC Holdings, Inc.*, 314 NLRB 1169 (1994).

Additionally, the Respondent's witnesses' testimony regarding the circumstances surrounding the creation of the decertification petitions was as confusing and contradictory as to place in question what actually had occurred. Eunice Johnson testified that later that day after the conclusion of the November 3 meeting with the maintenance staff she believed that temporary replacement employee "Miguel Sariano" gave her the first petition signed by four of the temporary employees except "Sariano" himself.[22] Miguel Serrano testified that all four copies of the petition were prepared by the temporary replacement workers on November 4, 1999, three of them containing all five signatures of these employees, one having only four signatures. Serrano also denied having taken the first petition to Johnson on November 3 or any of the petitions at any time. Moreover, all the signatures on the petitions in evidence are dated "11/4/99." Additionally, the fax transmittal sheet of the copy of the employee's petition, faxed to Jennifer Crook by Johnson is dated "11/4/99," and the circumstances of the unexplained and disconcerting alleged discovery of the original petitions by the Respondent attached to Johnson's faxes in the possession of its attorneys, especially in view of the representation by Johnson and the Respondent's attorney, Crook, that they could not find or produce such originals all tends to lead me additionally to discredit the Respondent's witnesses.[23] Therefore, from all of the record evidence, I find that a valid and plausible inference can be drawn that the Respondent was intimately involved in the creation of the temporary replacement employees' petition disclaiming support of the Union.

[21] However, the Respondent did turn over minutes of the meetings allegedly corresponding to these missing tapes of the board meetings.

[22] It should be remembered that there is no temporary replacement employee named "Miguel Sariano." Johnson mixed up in her testimony the names of employees Anibal Soriano and Miguel Serrano.

Analysis and Conclusions

The Board has held that a respondent may not withdraw recognition of the union based on the sentiments of temporary employees holding the positions of strikers who have been improperly denied reinstatement. Such sentiments are insufficient to show that the union has lost its majority support among employees and are also insufficient to support an employer's good-faith belief that a union has lost employees' majority support. *J. M. Sahlein Music Co.*, 299 NLRB 842, 850 (1990).

The Union was certified as the exclusive bargaining representative of the Respondent's unit employees in April 1998. A union is irrebutably presumed to continue to enjoy the support of a majority of the unit employees for 1 year after its certification (absent unusual circumstances).[24] Moreover, the record is clear that the replacement employees are temporary employees. It is also undisputed that the Respondent withdrew its recognition of the Union on November 8, 1999. The Respondent apparently defends its withdrawal of recognition in part on the decertification petition signed by the five temporary replacement employees. Based on the relevant Board law, the Respondent's reliance on the sentiments of temporary replacement employees to justify its withdrawal of recognition from the Union is misplaced.[25]

It is well established that an employer's reasonably based doubt as to a union's continued majority status "must be raised in a context free of unfair labor practices or other conduct of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Pirelli Cable Corp*., 323 NLRB 1009, (1997), quoting *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996*); Royal Motor Sales*, 329 NLRB 760 (1999); *Suzy Curtains, Inc*., 309 NLRB 1287 (1992*); Eby-Brown Co. L.P.*, 328 NLRB 496 (1999).

As the Board indicated in *Lee Lumber & Building Material Corp*., 322 NLRB at 177, in cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, such a

[23] Also, of additional significance is the failure of the Respondent to call its board of directors, Vice President John Porter, a major player in the November 3, 1999 meeting with the temporary replacement employees, to support any of the testimony of Johnson or Serrano. From the failure of a party to produce material witnesses or relevant evidence without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. 7-*Eleven Food Stores*, 257 NLRB 108 (1981), and cases cited therein. Also see *Hudson Moving & Storage Co*., 322 NLRB 1028 (1997).

[24] *Brooks v. NLRB*, 348 U.S. 96 (1954).

[25] *J. M. Sahlein Music Co.*, supra.

violation "will be presumed to taint any subsequent loss of support for the union, without any particularized demonstration of a causal relationship." In *Lee Lumber* the Board further stated:

> Our administrative experience in the intervening five decades has confirmed the validity of presuming that an employer's unlawful refusal to recognize and bargain with an incumbent union is likely to have a significant, continuing detrimental impact on employees, causing them to become disaffected from the union. This unlawful employer action is not a mere technical infraction. It is a most serious violation that "strikes at the heart of the Union's legitimate role as representative of the employees." If a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them.
>
> . . . .
>
> Lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive. Thus, delays in bargaining caused by an employer's unlawful refusal to recognize and bargain with an incumbent union foreseeable result in loss of employee support for the union, whether or not the employees know what caused the delay.

In *Pirelli Cable Corp.*, supra, the employer withdrew recognition from the Union and relied, in part, on an employee petition seeking decertification. The employees signed the petition immediately after the employer refused to reinstate unfair labor practice strikers, despite their unconditional offers to return to work. The Board found that the employer had committed unfair labor practices that would tend to cause significant employee dissatisfaction with the union. These included threats of discharge for engaging in a strike, unilateral changes in terms and conditions of employment and the employer's refusal to reinstate the strikers. The Board then stated:

> With the employees out of work and the Union seemingly powerless to help them, the cumulative effect of the Respondent's unlawful conduct would reasonably be to cause employees to abandon the Union.
>
> Under these circumstances, we find that the employee petition was tainted by the Respondent's unfair labor practices and that, therefore, the Respondent may not rely on the petition to establish a good-faith doubt that the Union represented a majority of employees. The Respondent, therefore, violated Section 8(a)(5) by withdrawing recognition from the Union. . . . [323 NLRB at 1010.]

The petition presented by the Respondent in the instant matter was not "raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself."[26] As previously found by me in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666, JD(NY)–64–00 the Respondent violated Section 8(a)(1) and (5) of the Act by engaging in a predetermined course of conduct designed to undermine the status of the Union and by bargaining in bad faith never intending to reach an agreement, but instead, dragging out the negotiations until the end of the certification year. I also found in my decision in the prior unfair labor practice cases, JD(NY)–64–00, that the Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully conditioning the strikers' reinstatement upon their abandoning the Union and by unlawfully failing and refusing to reinstate the striking employees.

Additionally, as will be more fully explained hereinafter, two of the very same temporary replacement employees, Anibal Soriano and Daryl Thomas-Bennett, who signed the petition upon which the Respondent purportedly relies to withdraw recognition, were the subject of the Respondent's unlawful interrogations, in violation of Section 8(a)(1) of the Act, and coercing employees in the exercise of their Section 7 rights. Moreover, the evidence in this trial establishes that the Respondent unlawfully interrogated the temporary replacement workers about their union sentiments in violation of Section 8(a)(1) of the Act. It also appears that the Respondents granted the temporary replacement employees benefits in the nature of medical coverage and increased pay to induce them to sign the decertification petition.

Therefore, the numerous unfair labor practices committed by the Respondent are clearly of the sort likely to affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Thus, the Respondent has failed to establish that it had a good-faith doubt about the Union's continued majority status. As to the petition the Respondent partially relies upon as a basis to withdraw recognition from the Union it was not raised in a context free of reasonable doubt, and as will be seen hereinafter, the petition is tainted.

That the Respondent's unlawful conduct and delays in bargaining deprived the Union of the opportunity to represent the employees, thereby undermining employee support for the Union, is applicable to the facts in this case.[27] And, while here, it was the replacements and not the strikers who signed the petition to be rid of the Union, and the unfair labor practices were directed at the strikers not the replacement workers, nonetheless, the petition signed by the replacements is tainted since objectively, the Respondent's unfair labor practices, including the failure to reinstate the striking employees, would prevent the replacements from exercising their right to refrain from signing such a petition.

Furthermore, to the extent that the Respondent relies on the decertification petition as justification for its withdrawal of recognition the evidence herein clearly shows that the petition was tainted. In response to the Union's renewed request to bargain, the Respondent decided to provide the temporary replacement employees with medical coverage before November 1, 1999, then conducted a mandatory meeting with these employees on November 3, 1999. At this meeting the Respondent unlawfully interrogated the employees about their union senti-

[26] *Lee Lumber & Building Material Corp.*, supra.

[27] Id.

ments, after having just informed them that the Union would seek reinstatement of the striking employees leading to the discharge of the temporary replacement workers. In addition, the Respondent did not deny that the newly granted medical benefits were discussed at this mandatory meeting. The evidence strongly suggests that the meeting had as its purpose the coercion of the employees into producing at the Respondent's suggestion and the signing of the decertification petition.

Moreover, the evidence raises a strong inference that the Respondent was involved in the creation of the petition. Eunice Johnson directed the temporary employees to put their refusal to be represented by the Union in writing. The testimony of Eunice Johnson and Miguel Serrano as to its occurrence was so contradictory and confusing as to create doubt as to whether the temporary employees actually drafted the petition of their own free will and represents the employees' uncoerced sentiments. The evidence further shows that Eunice Johnson reviewed the petition and rejected several of the employees' versions, sending it back until satisfied that it was right.

From all of the above, I find and conclude, that the Respondent violated Section 8(a)(1) and (5) of the Act, by refusing to recognize and bargain with the Union, and by withdrawing recognition from the Union as the exclusive bargaining representative of the Respondent's employees in the appropriate unit.

The Respondent argues with regard to the allegations in Case 29–CA–23137 that the strikers were lawfully terminated for engaging in an unprotected, illegal strike and because the strikers engaged in misconduct. Thus, the Respondent was privileged to withdraw recognition from the Union since the bargaining unit had been substantially depleted. "As the instigator of an illegal strike and through its insistence that Pratt agree to permissive or non-mandatory subjects of bargaining (the OCA Clause, the Evergreen Clause and the Union Security Clause) the Union breached its duty to bargain in good faith, thereby relieving Pratt of any duty to bargain. Furthermore, the Union continues to bargain in bad faith by insisting on the acceptance of an illegal subcontracting clause and upon a non-mandatory security bond clause."

Additionally, the Respondent points to the temporary replacement employees as the basis for its "good faith doubt, based on objective consideration," that they do not wish to be represented by the Union, "and therefore there is no unlawful refusal to bargain." Furthermore, soon after the Respondent advised the temporary replacement employees that the Union wanted to represent them, these employees signed a petition stating they did not want to be represented by the Union. "Therefore, Pratt possesses actual evidence of loss of majority status and was privileged to withdraw recognition."

Moreover, the Respondent's second and third affirmative defenses restate the Respondent's position as above set forth. The second affirmative defense maintains that the Union "does not represent a majority of the unit employees." The third affirmative defense asserts:

> Since on or about August 1999, the Union has bargained in bad faith with the Respondent by insisting to impasse and by striking to obtain illegal and non-mandatory contract terms, and by engaging in intractable "take-it or leave-it" bargaining with respect to mandatory terms and conditions of employment. The Union is still acting in bad faith by insisting that Pratt agree to an illegal subcontracting provision and an illegal union security clause. The foregoing conduct, covering a period of eighteen months, precludes the Union and the General Counsel from testing Respondent's good faith.

As concerns the second affirmative defense, in my prior decision, JD(NY)–64–00, I found that the Respondent had unlawfully refused to reinstate and did terminate the striking employees, six in number, and thereby violated Section 8(a)(1) and (3) of the Act. Since under the facts in this case it can be inferred that these striking employees still supported the Union, would be entitled to reinstatement to their former positions, with the termination of most, if not all, of the temporary workers hired to replace them, therefore the Union would, in fact, actually still represent a majority of the unit employees.[28]

As to the Respondent's third affirmative defense, in *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999), the Board stated:

> In *NLRB v. Borg-Warner Corp.*, 356 U.S. 324, 349 (1958) the Supreme Court held that the statutory duty to bargain in good faith extends to "wages, hours and other terms and conditions of employment", i.e. "mandatory" subjects of bargaining. On matters concerning those subjects, a party may insist on its position to the point of impasse, for in those areas "neither party is legally obligated to yield." Id. As to other "nonmandatory" subjects, however, different rules apply. Each party is free to make proposals on nonmandatory subjects, "to bargain, and to agree or not to agree." Id. However, a party may not insist upon agreement to a nonmandatory subject as a condition precedent to entering any collective-bargaining agreement. Id. Such conduct violates Section 8(a)(5) because it is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." Id. . . . . It is therefore well established that a party "ha[s] a right to present, even repeatedly, a demand concerning a nonmandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum." *Longshoreman ILA v. NLRB*, 277 F.2d 681, 683 (D.C.Cir. 1960). Accord: *Taft Broadcasting Co.*, 274 NLRB [260 (1985)] at 261. Furthermore, "[t]he mere fact of an impasse coincidental to continued disagreement on a nonmandatory subject of bargaining will not trigger the *Borg-Warner* unfair labor practice." *Latrobe Steel v. NLRB*, 630 F.2d 1761, 181 (3d Cir. 1980).
>
> By the same token, the fact that a party is engaged in a strike or a lockout does not, by itself, mean that the party has conditioned its willingness to enter into an agreement on acceptance of all of its proposals, including those relating to nonmandatory subjects. Thus, in *Oil Workers v.*

[28] Contrast, *Granite Construction Co.*, 330 NLRB 205 (1999). It should be remembered that the record evidence unequivocally shows that the replacement workers were temporary not permanent employees.

> *NLRB*, 405 F.2d 1111 (D.C. Cir. 1968), the court agreed with the Board that the employer, who had locked out its employees, was not unlawfully insisting on its nonmandatory proposal because the evidence showed that the nonmandatory proposal was not the cause of the impasse that led to the lockout.

There are certain situations in which the Board had found that a strike in support of a proposal on a nonmandatory bargaining subject is unlawful under *Borg-Warner* principles. These situations have involved a strike in support of insistence to impasse on the inclusion of a proposed nonmandatory subject in any collective-bargaining agreement[29] or a strike in furtherance of the unlawful condition that further bargaining depends on acquiescence to a demand on a nonmandatory subject.[30]

Moreover, in *Times Publishing Co.*, 72 NLRB 676 (1947), the Board noted:

> the test of good faith bargaining that the Act requires of the employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table.

In my prior decision in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666 (JD(NY)–64–00) I found that from the beginning of negotiations, the Respondent embarked on a plan to rid itself of the Union by stalling bargaining until the certification year was over, etc. The Respondent's raising of nonexistent issues that previously had been agreed upon with the Union (e.g., the picket-line clause, the subcontracting clause, and the security-bond clause), shows an "attitude" intended to preclude good-faith bargaining.

Moreover, in *Roadhome Construction Corp*., 170 NLRB 668 (1968), the union presented the employer with a form contract to sign and told them, there would be no changes allowed. The employer's refusal to bargain would not violate Section 8(a)(1) and (5) of the Act. However, at the time the Respondent took its position that it would not bargain with the Union, the Union had already modified its standard agreement (Independent Agreement) as to the effective dates, retroactivity, delay in insurance coverage, exclusion of guards, clarifying the intent of the picketing clause, withdrawing the subcontracting clause, and deleting the objectionable language in the duration clause. The Roadhome case permits a party to declare a lawful impasse that in certain limited circumstances suspends the obligation to bargain. It does not permit a withdrawal of recognition.

In sum, the Union's conduct in bargaining and in striking did not bear the hallmark of a *Borg-Warner* unfair labor practice. It was not "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *Detroit Newspapers*, 327 NLRB at 3, citing *Borg-Warner*, 356 U.S. at 349.

It is well established that Section 10(b) of the Act bars defenses based on unfair labor practices. *Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960); *Glaziers & Glass Workers Local 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1344 (9th Cir. 1982), and cases cited therein; *NLRB v. Tragniew, Inc*., 470 F.2d 669 (9th Cir. 1972). Also see *Sewell-Allan Big Star*, 294 NLRB 312 (1989), enfd. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992). It appears, therefore, that the Respondent's third affirmative defense is also time barred under Section 10(b) of the Act. The Respondent alleges in its defense that the Union engaged in bad-faith bargaining in August 1999, thus it could lawfully withdraw recognition from the Union. Under Section 10(b) of the Act, a charge alleging an unfair labor practice must be brought within 6 months of the occurrence. The Respondent's defense can only prevail if it were found that the Union committed the alleged violation of the Act in August 1999. Since such allegation is timed barred under Section 10(b) of the Act, the Respondent's defense is time barred.

Moreover, even if the Respondent's allegations had any factual or legal merit, or were it not time barred under Section 10(b) of the Act, it is, of course, true that, in certain circumstances, an employer's bargaining obligation may be curtailed by union bargaining tactics. *Greyhound Lines, Inc*., 319 NLRB 554, 556 (1995). For example, a strike in support of a union's unlawful insistence to impasse on permissive subjects of bargaining "suspends an employer's statutory bargaining obligation. See *Chicago Tribune Co*., 304 NLRB 259, 260 (1991) citing *Nassau Insurance Co.*, 280 NLRB 878 (1986)." And an employer my refuse to meet or bargain with a union because of flagrant strike violence that interferes with the bargaining process, "as long as that situation continues." *Greyhound Lines, Inc*., 319 NLRB at 556. Case law does not hold that such conduct by the Union, even if true, permanently exempts the Respondent from its bargaining obligations nor privileges the Respondent to withdraw recognition from the Union.

From all of the above, I find and conclude that the Respondent's second and third affirmative defenses have no merit and therefore I grant counsel for the General Counsel's motion to strike these affirmative defenses.

B. The complaint in Case 29–CA–23012 alleges that in or about mid-July 1999, the Respondent, by its agents, at its Brooklyn facility, interrogated employees about information relating to, and in preparation for, a pending unfair labor practice hearing in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666 thereby interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

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[29] In *Chicago Tribune Co*., the Board recognized potential merit in the employer's affirmative defense that strike action was unprotected because the unions had insisted to impasse on proposals for nonmandatory bargaining subjects. However, the Board subsequently affirmed the ALJ's finding that the Union's did not bargain to impasse on any nonmandatory subject. *Chicago Tribune Co*., 318 NLRB 920 (1995). Also see *Plumbers Local 141* (*International Paper Co*.), 252 NLRB 1299 (1980); *Electrical Workers Local 1049 (Lewis Tree Service*), 244 NLRB 124 (1979).

[30] In *Nassau Insurance Co*., 280 NLRB 878 (1986), one of the cases relied on by the Respondent, the Board held that an employer's obligation to bargain would at best be suspended by bad-faith bargaining on the union's part until the union gave assurances that the conduct would not be repeated. Therefore, even assuming arguendo, that Local 32B-32J bargained to impasse on either permissive or unlawful subjects, only a hiatus of bargaining could arise.

1. The evidence

During the prior unfair labor practice hearing in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666, the Respondent elicited testimony in defense of its refusal to reinstate the striking employees on the grounds that the strikers had engaged in misconduct and that the strike was unlawful. On July 22, 1999, the Respondent called among other witnesses, Anibal Soriano and Daryl Thomas-Bennett, two of the temporary replacement workers to testify at the trial in support of its defense of striker misconduct. While testifying under oath, both Soriano and Thomas-Bennett admitted that the Respondent and its counsel interrogated them about alleged striker misconduct against them in preparation for the unfair labor practice proceeding.

Soriano testified that approximately 1 week before he appeared as a witness in the prior hearing, he was called to his "boss" Eunice Johnson's office, and then met with one of the Respondent's attorneys, possibly Andrew Baron, Esq., in another room where Baron questioned him about what happened during the strike. Soriano stated that Baron did not advise him that he was not required to speak to him, nor that, should he choose not to do so, the Respondent would not retaliate against him in any way.[31]

Daryl Thomas-Bennett testified that Johnson had called him "to her office and told him that she wanted him "to talk to the attorneys." Thomas-Bennett unequivocally stated that Johnson said nothing else, not telling him that he didn't have to talk to the attorneys if he didn't want to and that no retaliation would be taken against him if he refused to do so. Thomas-Bennett identified the attorney who interrogated him as Andrew Baron. He stated that Kevin McGill was also present and Thomas-Bennett waited outside the community room while the attorneys questioned Anibal Soriano. Thomas-Bennett added that they failed to tell him that he did not have to talk to them, or that he "could walk out and nothing will happen to you if you just walk out."

Analysis and Conclusions

Despite the inherent danger of coercion, the Board and courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring 8(a)(1) liability. The purposes which the Board and courts have held legitimate are of two types: the verification of a union's claimed majority status to determine whether recognition should be extended, and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case. *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enfd. denied 344 F.2d 617 (8th Cir. 1965).

In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. As the Board stated in *Johnnie's Poultry*, the employer,

> Must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis. . . . When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. [Id. at 775.]

In addition, the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature.

Where an employer, or its attorney, fails to follow these safeguards in employee interviews in preparation for an unfair labor practice hearing, the Board will find that the employer has violated Section 8(a)(1) of the Act. The Board generally requires strict compliance with the *Johnnie's Poultry* safeguards. *Le Bus*, 324 NLRB 588 (1997), citing *Standard-Coosa-Thatcher, Carpet Yarn Division*, 257 NLRB 304 (1981); *L & L Wine & Liquor*, 323 NLRB 848, 853 (1997). Although the Board is strict in its requirement that the proper assurances be given during an interview, the Board has also found that unusual settings and special circumstances may excuse or mitigate an employer's failure to give the required assurances. *Le Bus*, supra.

As evidenced by the testimony of Anibal Soriano and Daryl Thomas-Bennett, the Respondent, and its counsel, questioned these employees in preparation for the trial without giving them the assurances required under *Johnnie's Poultry*. Moreover, it appears that the questioning took place in an inherently coercive setting: the employees were called to the interviews by their "boss," Property Manager Eunice Johnson the person who had also hired them, it took place on the Respondent's premises, and either in or near Johnson's office.

However, the Respondent alleges in its brief that "*Johnnie's Poultry* has absolutely no application to the factual situation relied upon by the General Counsel in Case 29–CA–23012. . . . There was neither a need nor any requirement for Pratt to issue any *Johnnie's Poultry* warnings to Soriano or Thomas-Bennett." The Respondent denies that it made any inquiry "whatsoever involving the exercise of Section 7 rights by either Soriano or Thomas-Bennett;" and asserts rather that the interview of these two employees involved their role "as victims of union-sponsored strike violence." Moreover, the Respondent maintains that "here there was no interrogation, there was no implied threat made to these employees and there is no inherent coercion in asking victims of strike violence to tell their employer what happened."

The Respondent states that Soriano and Thomas-Bennett, were interviewed by Pratt representatives solely in regards to "unprotected activity," namely striker misconduct. Section 7 rights "do not include the right to threaten replacement employees with violence if they continue to come to work." Thus, since there was no "unwarranted intrusion into the protected activities of Soriano and Thomas-Bennett in their interrogation, and *Johnnie's Poultry* does not apply."

"The rule of *Johnnie's Poultry* does not apply to every interview an employer conducts with his employees. *Delta Gas*,

[31] Soriano also testified that the day before he appeared as a witness in the prior case, he spoke to the Respondent's attorney, Jennifer Crook, about alleged incidents of striker misconduct in preparation for trial. Soriano testified that Crook informed him of his "Johnnie's Poultry" rights.

Inc., 282 NLRB 1315, 1325 (1987);[32] *Pacific Southwest Airlines, Inc*., 242 NLRB 1169, 1170 fn. 4 (1979).[33] However, in the instant case the Respondent has not met its burden of showing that any special circumstances existed that would warrant excusing the Respondent from its obligations to give the employees interrogated the *Johnnie's Poultry's* required assurances.

At the trial the Respondent's counsel raised the defense that the Respondent did not unlawfully interrogate employees because it was the strike replacements, themselves, who complained to the Respondent about alleged violence against them by the strikers which brought on the interrogations. This is contradicted by the record evidence. Both Soriano and Thomas-Bennett testified that the first time any of the Respondent's representatives asked them about what, if, anything had happened to them during the course of the strike was the week before the first trial. Based upon the Respondent's own witnesses, the Respondent's counsels' representation, that it was the employees who came to the Respondent to complain, was not supported by the evidence, and it is apparent that both conversations were obviously initiated, by the Respondent in preparation for the upcoming unfair labor practice hearing. However, I really don't see how this affects whether *Johnnie's Poultry* assurances would be required in this instance, anyway.

The Respondent also argues that *Johnson's Poultry* does not apply because the interrogation was not about the employees Section 7 activity. I do not agree. In *Anserphone, Inc*., 236 NLRB 931 (1978), the employer failed to give employees the requisite *Johnnie's Poultry* assurances when it questioned them 3 days before trial about a discharged employees' alleged misconduct. The Board affirmed the administrative law judge's finding that the employer's interrogation of the employees about the discharged employees' alleged misconduct violated Section 8(a)(1) of the Act. The judge stated, "[A]n employer may ascertain facts necessary to its defense from employees if among other things it assures them that no reprisals will take place and obtains their participation on a voluntary basis," and where the employer failed to abide by those simple guidelines, the employer's interrogation was unlawful. Similarly, the Respondent's questioning of Soriano and Thomas-Bennett violated the Act, since the Respondent failed to give them the requisite *Johnnie's Poultry* assurances, even if they were questioned about the strikers conduct. Moreover, the Respondent's contention that the questioning was not about Section 7 activity is not correct. Even if the Respondent questioned the replacement employees about the strikers conduct on the picket line, this line of questioning relates to the strikers Section 7 rights to engage in a strike and picketing, and perhaps whether they engaged in any conduct that removed them from the protection of the Act as alleged by the Respondent.[34]

From all of the above, I find and conclude, that the Respondent violated Section 8(a)(1) of the Act when it interrogated employees, about information relating to, and in preparation for, a pending unfair labor practice hearing, in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666, thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.[35]

C. At the end of the hearing the General Counsel moved to amend the complaint in Case 29–CA–23137 to allege that the Respondent, by Eunice Johnson and John Porter, unlawfully interrogated its employees about their union sentiments in violation of Section 8(a)(1) of the Act. I granted this motion over the objection of the Respondent.

2. The evidence

The evidence shows that during the Respondent's November 3 meeting with the temporary replacement employees, the employees were told by board of director's vice president, John Porter, that the Union had contacted the Respondent and requested to meet and to resume bargaining. While Johnson testified that both she and Porter told the replacement workers that they believed that the Union would demand that the striking employees be reinstated and the temporary replacement employees dismissed, Serrano testified, that Porter had said that, if the strikers returned to work, the replacement employees would be terminated. Additionally, Miguel Serrano, at first testified that, after Porter told the employees that the Union wanted to represent the temporary replacement employees, he asked these employees if they wanted to be represented by the Union; "what do we think, do we want them to represent us or not." Later, on cross-examination, and after counsel for the General Counsel had indicated her intention, to amend the complaint, to allege an additional allegation of unlawful interrogation, based on Serrano's statement, Serrano then changed his testimony to deny that Porter asked the employees if they wanted to be represented by the Union. I do not credit Serrano's testimony as to this denial. Serrano also testified that Johnson did not ask the

[32] In *Delta Gas*, the administrative law judge found, with Board approval, that "[w]here, as here, the interview covers only work performance and does not touch on any protected activities, the *Johnnie's Poultry* rule does not apply. *Alton Box Board Co*., 155 NLRB 1025 (1965)."

[33] In *Pacific Southwest Airlines, Inc.*, supra, the Board agreed with the administrative law judge that *Johnnie's Poultry* does not apply here because while it would be relevant where questioning employees with regard to verification of a union's majority status and preparation of a defense to an unfair labor practice charge, it is not applicable to "prearbitration hearing preparation which was engaged by the company attorney in this case."

[34] Some cases, cited by the Respondent in its brief to support its contentions, do not do so. For example see, *Levingston Shipbuilding Co.*, 249 NLRB 1 fn.2 (1980), also id. at 8–9; *Alton Box Board Co*., 155 NLRB 1025, 1040–1041 (1965). In *Alton Box Board Co.*, supra, the administrative law judge, affirmed by the Board, found that the interrogation of the employees "was conducted under proper safeguards, and that was so even if compliance therewith had been necessary in an inquiry pertaining to protected activity. The object of the interviews, to determine responsibility for the illegal work stoppage, was disclosed. No employee was asked anything about his union sympathies or activity. All were assured that their jobs were not in jeopardy. None was threatened with reprisal for refusing to answer questions and signing statements." The judge found no violation of Sec. 8(a)(1) of the Act. Also see *Saint Luke's Hospital*, 258 NLRB 321 (981).

[35] *Johnnie's Poultry* supra; *Le Bus*, supra, citing *Standard-Coosa-Thatcher, Carpet Yarn Division*, supra; *I.T.T. Automotive*, 324 NLRB 609 (1997); *Kuna Meat Co.*, 304 NLRB 1005 (1992).

replacements during this meeting if they wanted to be represented by the Union.

Analysis and Conclusions

The Board in *Blue Flash Express*, 109 NLRB 591 (1954), set forth the basic test for evaluating whether interrogations violate the Act: whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. This longstanding test was reiterated in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Sunnyvale Medical Clinic, Inc*., 277 NLRB 1217, 1218 (1985), the Board stated:

> The Board in *Rossmore House* outlined some areas of inquiry that may be considered in applying the *Blue Flash* test, stressing that these other relevant factors were not to be mechanically applied in each case. Thus, the Board mentioned the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation.

Evidence of actual coercion is not necessary and in determining whether the conduct tends to be coercive, an objective standard is applied. The Board considers all the surrounding circumstances and in addition to the above criteria other relevant factors such as, whether the interrogation was aimed at the employee, whether the employer displayed antiunion animus, whether the interrogation had any lawful purpose. *Sunnyvale Medical Clinic*, supra. The words themselves, or the context in which they were used, must suggest an element of restraint, coercion, or interference.

The totality of the circumstances herein establishes that, the Respondent's questioning of the temporary replacement employees, during the November 3 meeting, about whether they wanted the Union to represent them, violated Section 8(a)(1) of the Act. First, the evidence shows that after the Union contacted the Respondent to resume bargaining and prior to the November 3 meeting, the Respondent notified the temporary replacement employees, that the Respondent was going to provide them with medical insurance. Next, contrary to the Respondent's contention, it appears that the November 3 meeting was not a regular staff meeting, but a meeting called solely in response to the Union's renewed request to bargain, and that the Union was a main topic of conversation at this meeting. Moreover, the questioning of the employees, came from the Respondent's vice president and liason between the board of directors and the maintenance staff, John Porter, and was held in the presence of Eunice Johnson, their "boss" and the person who had hired them and also asked questions during the meeting. The Respondent also questioned the employees after telling them that the Union would seek their termination. The questioning had no valid purpose other than to unlawfully question the employees about their union sentiments, which relates directly to the employees protected activity and seeks to elicit the precise type of information that employees are privileged to keep from their employers.[36] In fact, a strong inference can be drawn from the record that the November 3 meeting occurred for the purpose of coercing the employees into preparing and signing the decertification petition. Also, the interrogation of these employees must be considered, in light of the Respondent's previous unfair labor practice conduct, as found by me, which includes its plan to rid itself of the Union by bad faith bargaining and by unlawfully discharging the striking employees who supported the Union.

Therefore, from all the above circumstances, I find and conclude that the Respondent's interrogation of its employees, about their union sentiments, at the November 3 meeting, by John Porter, violated Section 8(a)(1) of the Act, since it reasonably tended to restrain, coerce, and interfere with their rights guaranteed by Section 7 of the Act.[37]

3. The Respondent's affirmative defenses

The Respondent raises four affirmation defenses in its answer to the complaint in Case 29–CA–23137. In its first affirmative defense the Respondent contends that the complaint allegations are time barred by Section 10(b) of the Act. In its answer to the complaint in Case 29–CA–23137 the Respondent admitted that the charge was filed on November 19, 1999, and served on the Respondent by regular mail on November 23, 1999. The Respondent further admitted therein that it withdrew recognition from and refused to recognize and bargain with the Union on November 8, 1999. Therefore, the Respondent has admitted that the alleged unfair labor practice occurred less than six months prior to the filing and service of the charge, in compliance with Section 10(b) of the Act.

The Respondent, however, asserts that "the refusal to bargain with the Union, or to have any further dealings with the Union, commenced in late March 1999 when the strikers were terminated for engaging in an illegal Union-initiated strike." The termination of these strikers substantially depleted the bargaining unit and relieved Pratt of any duty to bargain with the Union.[38] "Therefore, the refusal to bargain with the Union, occurred concurrently with the termination of the illegal strikers, (in late March 1999) and the Union's November 19, 1999, is untimely." I do not agree.

In my Decision, in Cases 29–CA–22637, 29–CA–22660, and 29–CA–22666 (JD(NY)–64–00), I found that the Respondent had unlawfully discharged its striking employees and ordered reinstatement and backpay with interest, thus the Respondent's duty to bargain with the Union in good faith remained in force. Since the Respondent has admittedly withdrawn its recognition of the Union, as the exclusive collective-bargaining representative of the unit, and has failed and refused to recognize and bargain with the Union, since November 8, 1999, the Union's charge is not untimely.

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[36] *Royal Manor Convalescent Hospital*, 322 NLRB 354, 362 (1996); *Advanced Waste Systems, Inc*., 306 NLRB 1020 (1992); *Club Monte Carlo Corp*., 280 NLRB 257 (1986), enfd. 821 F.2d 354 (6th Cir. 1987).

[37] There is insufficient evidence in the record to find that Eunice Johnson also questioned the replacement employees as to their union sympathies in violation of Sec. 8(a)(1) of the Act.

[38] The Respondent cites *Granite Construction Co.*, 330 NLRB 1 (1999); and *Marathon Electric*, 106 NLRB 1171 (1953), in support of its contention.

Accordingly, the Respondent's first affirmative defense is without merit and I therefore grant counsel for the General Counsels' motion to strike this affirmative defense.

The Respondent's second and third affirmative defense's were considered previously herein and found to be without merit.

The Respondent's fourth affirmative defense asserts that,

> Since on or about February 22, 1999, the Union, which has distinguished itself as a persistent violator of the National Labor Relations Act (as evidenced by ten officially reported NLRB or ALJ decisions), has embarked on a course of violent and destructive behavior which has threatened the health, safety and welfare of the residents of Pratt Towers and therefore attempts at good faith bargaining with it would be futile.

In my prior decision JD(NY)–64–00, I found that the Union had not "embarked on a course of violent and destructive behavior which has threatened the health, safety, and welfare of the residents of Pratt Towers." I also found, therein, that the strikers misconduct alleged by the Respondent to sustain this affirmative defense, either did not occur, was not attributable to the strikers, were unsubstantiated, in most part, or not serious enough to support denial of reinstatement.

Board law establishes that "an employer may refuse to meet and bargain with a union because of flagrant strike violence that interferes with the bargaining process, as long as that situation continues." *Greyhound Lines, Inc*., 319 NLRB at 556, and cases cited therein. Moreover, there is no legal precedent for the proposition that union-sponsored strike violence constitutes bad-faith bargaining under Section 8(b)(3) of the Act. In *NLRB v. Insurance Agents' International*, 361 U.S. 477 (1960), the Supreme Court held that unprotected union-sponsored conduct away from the bargaining table does not amount to a violation of Section 8(b)(3) (id. at 490). As the Board stated in *Greyhound Lines*,

> But the Court said,
>
> simply because certain union activity "is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith." (quoting *Insurance Agents*). Thus, employee violence is generally handled through the employer's right to discipline employees for individual misconduct; union-sponsored violence is generally handled through the mechanism of Section 8(b)(1)(A) of the Act and the invocation, where necessary, of state and local law. . . . But Congress, the Board, and the courts have not provided a further remedy insofar as making union-sponsored violence a violation of Section 8(b)(3) of the Act.
>
> Thus, even if the Respondent's allegations of strike violence were proven, it would not constitute an adequate defense to the Complaint allegations, and would not privilege the Respondent to withdraw recognition from or refuse to bargain with, the Union.

The Respondent, in support of its fourth affirmative defense, asserts in its brief that the record evidence establishes that, "the Union attempted to freeze the Pratt community in submission. The timing of the strike to take advantage of the falling temperatures, the perverse lowering of the thermostat, the ensuing picketing of the premises with the stated object of preventing any assistance to Pratt, all attest to a reckless disregard for the health, safety and welfare of the community. The Union was perfectly willing to jeopardize the lives of these people in order to obtain a signed contract." I do not agree. The Respondent cites *NLRB v. Federal Security, Inc*., 154 F.3d 751 (7th Cir. 1998), in which the court of appeals held that the test is whether the union and the strikers "endangered the lives of others." supra at 755. However, as found in my prior decision JD(NY)–64–00, and based on the record evidence, the Respondent has failed to sustain its burden of establishing this defense or that the Union and the strikers had "endangered the lives of others."[39]

From the above, I find that the Respondent's fourth affirmative defense is without merit and I therefore grant the counsel for the General Counsel's motion to strike this affirmative defense.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist there from and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully withdrawn its recognition of the Union since November 8, 1999, as the exclusive collective-bargaining representative of its employees in an appropriate unit, and has failed and refused to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act, the Respondent shall be ordered to recognize and, on request, bargain with the Union in good faith as the exclusive collective-bargaining representative of employees in the appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, to embody that understanding in a signed agreement. Also, see the remedy set forth in my prior decision JD(NY)–64–00. I additionally recommend that the Respondent be ordered to post an appropriate notice to employees.

Additionally, the Union seeks reimbursement for "union costs and attorney's fees based upon the arguments previously

[39] There is no evidence in the record that the shutting down of the boiler would result in "leaving the predominately elderly residents of the co-op to huddle next to their gas stoves for warmth," or that had a Pratt resident been hospitalized (or worse) "business agent Gross and the three implicated strikers would be in custody today." The Respondent paints its own grim view, albight an unwarranted and untrue picture, of this occurrence.

made."[40] For the reasons set forth in my prior decision JD(NY)–64–00, I find that the Union's request for union costs and attorney's fees are unwarranted.

Moreover, because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act.

CONCLUSIONS OF LAW

1. Pratt Towers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time building service employees employed by the Respondent at its 333 Lafayette Avenue, Brooklyn, New York facility, excluding all guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive collective-bargaining representative of the employees in the above unit.

5. At all material times, Eunice Johnson, the Respondent's property manager, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent, acting on its behalf. Also, at all material times, John Porter, the Respondent's board of director's vice president has been an agent of the Respondent, acting on its behalf.

6. From February 22, 1999, to March 15, 1999, the Respondent's employee's Keith Robinson, Lawrence Folkes, Theorgy Brailsford, Curtis Bailey, Angel Venzen, and Jude Obaseki engaged in a strike.

7. On March 11 and 15, 1999, the above striking employees made unconditional offers to return to their former positions of employment.

8. The Respondent failed to carry its burden of establishing that the striking employees engaged in misconduct of sufficient seriousness to deny them reinstatement to their former positions.[41]

9. The Respondent has failed to carry its burden in establishing it affirmative defense that the Union does not represent a majority of the unit employees.

10. The Union represents a majority of the Respondent's employees in the above unit appropriate for the purpose of collective bargaining.

11. By withdrawing its recognition of the Union, on or about November 8, 1999, the Respondent has failed and refused to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

12. The Respondent has failed to carry its burden in establishing its affirmative defense that the Union bargained in bad faith "by insisting to impasse and by striking to obtain illegal and nonmandatory contract terms, and by engaging in intractable 'take-it-or leave-it' bargaining with respect to mandatory terms and conditions of employment . . . . The foregoing conduct, covering a period of eighteen months, precludes the Union and the General Counsel from testing Respondent's good faith."

13. By coercively interrogating employees about their union sentiments and those of others, the Respondent violated Section 8(a)(1) of the Act.

14. By coercively interrogating employees concerning information relating to, and in preparation for, a pending unfair labor practice hearing in Cases 29–CA–22657, 29–CA–22660, and 29–CA–22666, the Respondent violated Section 8(a)(1) of the Act.

15. The Respondent has failed to carry its burden in establishing its affirmative defense that the complaint allegations in Case 29–CA–23137 "are barred by Section 10(b) of the Act."

16. The Respondent has failed to carry its burden in establishing its affirmative defense that, "Since on or about February 22, 1979, the Union, which has distinguished itself as a persistent violator of the National Labor Relations Act (as evidenced by the officially reported NLRB or ALJ decisions), has embarked on a course of violent and destructive behavior which has threatened the health, safety and welfare of the residents of Pratt Towers and therefore attempts at good faith bargaining with it would be futile."

17. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

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[40] See my prior decision JD(NY)–64–00 pps. 69–71. The General Counsel did not request such reimbursement in these cases, nor does she take a position on the Union's request for reimbursement of its reasonable union costs and attorney's fees.

[41] See JD(NY)–64–00. I found therein that by unlawfully discharging and refusing to reinstate the striking employees unless and until they abandoned their support for the Union, Pratt Towers has engaged in unfair labor practices within the meaning of Sec. 8(a)(1) and (3) of the Act. I also, found therein that, Pratt Towers failed to carry its burden in establishing its defense that the strike engaged in by the striking employees was unlawful, since its object was to compel the Respondent to sign an agreement containing illegal clauses in violation of the Act, and that the Union bargained in bad faith, therefore the Respondent was not required to reinstate its striking employees.